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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re ANGELO G. et al., Persons Coming
Under the Juvenile Court Law.

SAN BERNARDINO COUNTY
DEPARTMENT OF CHILDREN'S
SERVICES,

Plaintiff and Respondent,

v.

PATRICK P. et al.,

Defendants and Appellants.

E044406

(Super.Ct.Nos. J205416, J205417,
J205418 & J214531)

OPINION

APPEAL from the Superior Court of San Bernardino County. A. Rex Victor,
Judge. Affirmed.

William Hook, under appointment by the Court of Appeal, for Defendant and
Appellant Father.

Monica Vogelmann, under appointment by the Court of Appeal, for Defendant
and Appellant Mother.

Ruth E. Stringer, County Counsel, and Jeffrey L. Bryson, Deputy County Counsel,
for Plaintiff and Respondent.

Leslie A. Barry, under appointment by the Court of Appeal, for Minors.

Father Patrick P. appeals the denial of his petition to modify the prior order denying reunification services. Both Patrick P. and mother, F.G., appeal from the judgment terminating their parental rights to the children, freeing them for adoption. Mother did not join in father's petition for modification in the trial court, although she joins his brief on appeal. Finding no errors, we affirm.

1. Background

F.G. is the mother of Joseph G., J.G., Angelo G., and Daniel P. Patrick P., is the father of Angelo G. and Daniel P. His relationship to Angelo was established after the dependency action was initiated. The fathers of Joseph and J. are not involved in this appeal. Before Daniel was conceived, mother lost custody of Joseph, J. and Angelo when Angelo was born with methamphetamines in his system. The children were declared dependents on March 9, 2006, based on a petition alleging parental neglect (Welf. & Inst. Code,¹ § 300, subd. (b)), as well as an allegation mother had previously failed to reunify with two other older half-siblings, due to mother's neglect. Her failure to comply with family reunification services in the prior dependency resulted in a termination of her parental rights as to those children. The children were ordered into the care of the Department of Children's Services (DCS), and placed with a maternal cousin.

¹ All statutory references are to the Welfare and Institutions Code unless otherwise stated.

Patrick was found to be the father of Angelo and deemed eligible for reunification services at an appearance review hearing on April 24, 2006. Subsequently, mother and father began cohabiting and worked diligently towards reunification. Thus, on September 11, 2006, at the semi-annual review hearing, the children were returned to mother's and father's custody under a family maintenance plan, after the court determined the parents' progress had been substantial.

Things did not go well. A month after he was returned, Angelo, then aged 10 months, was found to have bruising on the insides of both his ears, on the right side of his face, and on his upper right thigh, as well as a bite mark on his right forearm. Although reported to DCS, Angelo was returned to the parents' home. Another month later, a public health nurse visited the home and found Angelo's weight had dropped and his length had fallen off the growth curve. He seemed to improve by December 2006.

In February 2007, another visit by the health nurse found Angelo to be severely underweight, dehydrated, under-stimulated and inactive. The social worker was contacted and the child was taken to Loma Linda University Medical Center for evaluation. A second trip was required on a different day, as blood could not be drawn on the first visit. Angelo was diagnosed as failure to thrive and admitted to the hospital for tests. He was also observed to have bruising on his inner and outer ear, and red bruising on the back of his head. At this same period of time, mother, five months pregnant with Daniel, tested positive for methamphetamines. Angelo, Joseph and J. were redetained on combined subsequent/supplemental petitions (§§ 342, 387) alleging that

Angelo had been neglected based on his condition of “failure to thrive,” and that the prior disposition had been ineffective in the protection or rehabilitation of the children.

The results of the bone scans performed as part of Angelo’s assessment eventually revealed a healed fracture deformity of the left radius and ulna, three to four weeks of age. Angelo’s supplemental/subsequent petition was amended on February 28, 2007, to add allegations of serious physical harm to Angelo that would not occur without unreasonable or neglectful acts (§ 300, subd. (a)), and severe physical abuse to a child under five. (§ 300, subd. (e).) The subsequent/supplemental petitions of Joseph and J. were amended to include allegations of their sibling’s physical abuse.

The social worker’s report of March 12, 2007, prepared for the jurisdictional hearing on the supplemental/subsequent petitions, indicated that each parent blamed the other for Angelo’s condition. Father admitted he had witnessed mother physically abusing Angelo, but he admitted leaving the home for a few days after a fight with mother, despite knowing she was using drugs, leaving the children alone in her care. Father reported that he had observed mother hit Angelo on his arm, throw the baby down in his crib, and shove a sock in Angelo’s mouth. Neither parent could explain the bruising or fractures to Angelo, and neither seemed to be concerned about his weight or listlessness.

The report further noted that Joseph and J. responded positively to mother, but Angelo was not bonded to her; instead, he responded to her with fear. Angelo did not like being held by either mother or father. However, he was very well bonded to the foster mother, reaching for her, hugging her when she picked him up, and behaving very

affectionately. Joseph missed his mother and Patrick and wanted to go home to be with them, but J. and Angelo were comfortable and happy in their foster placement. The original recommendation was to grant additional reunification services to the parents. At the initial jurisdictional hearing, minors' counsel objected to the recommendation that services be provided and set the matter as a contested hearing.

On April 13, 2007, the social worker submitted an addendum report recommending that existing services be terminated due to the poor prognosis that the parents would be able to significantly remedy the issues that led to the second removal of the children. On May 2, 2007, the department filed a dependency petition as to Daniel P., based on the allegations of abuse and neglect of his siblings. Daniel had been born several weeks prematurely and was detained in the hospital. DCS recommended no reunification services for the parents due to the parents' failure to benefit from the previous provision of services.

Prior to the contested hearing on the petitions, an addendum report was filed, disclosing additional details about the abuse of Angelo, which father witnessed. In it, the social worker reported statements of father that he had observed mother spanking Angelo for no reason, placing a sock in Angelo's mouth to keep him quiet, screaming at Angelo, and throwing Angelo down in his crib with sufficient force to make him bounce up and flip over. Father further reported seeing mother "whack" Joseph and J., and pummel Joseph with both hands. Father acknowledged he had been neglectful by failing to intervene to protect the children. Mother admitted to the social worker she had struck Angelo harder than she should have, on multiple occasions, admitted using the sock to

quiet Angelo, admitted she was using methamphetamines, and that she had anger problems.

The combined jurisdictional/dispositional hearing as to all the petitions and all the children took place between June 5, 2007, and June 7, 2007. Based on the testimony presented, the trial court made true findings on all the allegations of the subsequent petitions (§ 342) as well as the supplemental petitions (§ 387) respecting Angelo, Joseph and J. The court found that Angelo had been subjected to serious physical harm (§ 300, subd. (a)), neglect by both parents (§ 300, subd. (b)), and severe physical abuse to a child under five years of age. (§ 300, subd. (e).) As to Joseph and J., the court also found the allegations of the petitions true, including the supplemental petition. As to all three children, the court found the previous disposition had been ineffective in protecting and rehabilitating the children.

As to Daniel, the court made true findings on all allegations of the original petition and declared him a dependent by virtue of the abuse and neglect of his siblings. The court denied further reunification services to both parents due to the severe physical abuse of Angelo (§ 361.5, subd. (b)(6) & (7)), the failure of the parent to reunify with a sibling or half-sibling who had been removed from parental custody (§ 361.5, subd. (b)(10)), and mother's extensive history of drug use. (§ 361.5, subd. (b)(13).) The matter was set for a selection and implementation hearing.

The adoptability assessment revealed the children had a strong bond with each other and with their caregivers. Joseph did not want to be moved from the placement, preferring to live with the caregivers forever, and Angelo's development had greatly

improved in foster care. The report prepared for the selection and implementation hearing recommended termination of parental rights. In this report, the social worker stated the parents visited regularly, the visits appeared appropriate, and commented that the children appeared to be bonding appropriately to the parents. However, the children said goodbye to the parents easily and, in the social worker's opinion, termination of parental rights would not be detrimental to them.

Prior to the selection and implementation hearing, father filed a petition seeking modification of the prior order terminating and denying reunification services as to Angelo and Daniel. (§ 388.) Father asserted his circumstances were changed in that he was employed, and had completed both parenting and anger management classes. He alleged the modification was in the children's best interests because he visited regularly and the social worker had reported that the children appeared to be bonding appropriately with the parents. The court summarily denied the petition without an evidentiary hearing because the request did not show it would be in the best interests of the children to change the prior order.

The selection and implementation hearing was held on October 30, 2007. After hearing testimony from the social worker and the father, the court found by clear and convincing evidence that the children were adoptable. The court terminated parental rights of father as to Angelo and Daniel, and terminated the parental rights of mother as to all four children. The court further found that none of the exceptions to adoptability applied. Mother and the father of Angelo and Daniel have appealed.

On appeal, Father challenges (1) the summary denial of the petition for modification and (2) the finding there was no beneficial parent-child relationship as an exception to the finding of adoptability. Mother joins father's argument relating to the denial of the petition for modification, and argues (1) the trial court erred in finding there was no beneficial parent-child relationship between mother and her children, particularly Joseph, (2) termination of her parental rights to Angelo and Daniel should be reversed because it would interfere with their relationship to their older siblings, and (3) that if father's appeal is successful, the judgment terminating her parental rights must also be reversed.

2. Discussion

A. *Summary Denial of Father's Petition for Modification Was Not an Abuse of Discretion.*

Father challenges the summary denial of his petition for modification.² He contends his petition made a prima facie showing of changed circumstances and best interests, such that the denial of the petition without an evidentiary hearing violated his right to due process under the law. We disagree.

Section 388, provides in relevant part that a parent may petition the court for a hearing to change, modify, or set aside any order of the court previously made or to terminate the jurisdiction of the court. It further provides that if it appears that the best

² Although mother joins in all relevant issues raised by Patrick, we observe she did not join his petition for modification in the trial court so this issue was not preserved for appeal by mother.

interests of the child may be promoted by the proposed change of order, the court shall order a hearing.

A petition under section 388 must be liberally construed in favor of its sufficiency. (Cal. Rules of Court, rule 5.570(a).) If the petition presents any evidence that a hearing would promote the best interests of the child, the court must order the hearing. (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431-432.) The court has discretion whether to provide a hearing on a petition alleging changed circumstances (*In re Angel B.* (2002) 97 Cal.App.4th 454, 460), but it may deny a hearing ex parte where the application fails to reveal changed circumstances or new evidence (*In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413-1414), or fails to show that the proposed change would promote the best interests of the child. (Cal. Rules of Court, rule 5.570(d); *In re Zachary G.* (1999) 77 Cal.App.4th 799, 807.) A prima facie showing of both elements is required to trigger an evidentiary hearing. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 191.)

Father asserts he established both prongs of section 388 and was entitled to a hearing as a matter of right, relying heavily on *In re Jeremy W.*, *supra*. We do not agree with his premise. In *Jeremy W.*, the mother had fully completed the reunification plan prior to the termination of services but the case was referred for permanency planning solely because she lacked adequate housing. (*In re Jeremy W.*, *supra*, 3 Cal.App.4th at p. 1415.) The petition for modification, filed after she had obtained housing, while continuously maintaining her sobriety and attending counseling at her own expense, established the child was strongly bonded to her. (*Id.* at p. 1416.)

Unlike *Jeremy W.*, father did not establish both prongs of section 388, so the court had discretion to deny the petition ex parte. While father has completed anger management and parenting classes, these were not the only requirements of the plan; his case plan required that he would obtain resources to meet the needs of his children and to provide a safe home. His failure to provide a safe home led to the subsequent petition alleging his neglect, resulting in Angelo's severe abuse and the neglect of the other children. Obtaining employment and attending two classes are insufficient to establish changed circumstances, although they may signify changing circumstances. (See *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

Regarding the best interests prong, father merely asserted he was visiting the children regularly and they "appear to be bonding appropriately with the parents." While the social worker's report does include this statement, we do not consider it in isolation where the same report concluded that termination of parental rights would not be detrimental because no exception applied. Further, evidence that bonding "was occurring" does not establish the existence of a significant relationship to a parent for purposes of establishing the best interests prong. Father did not make a prima facie showing that modification would promote their best interests.

Because Patrick did not establish both prongs necessary to trigger the right to a hearing, the court had discretion to deny the petition ex parte, and properly exercised its discretion in determining that the petition failed to show that a modification would be in the children's best interests.

B. Neither Father Nor Mother Established the Existence of a Beneficial Parent-Child Relationship.

Both parents argue that termination of parental rights is detrimental to the children because of a beneficial parent-child relationship. We disagree.

Because the contention asserts inadequate evidentiary proof of the existence of an exception to a finding of adoptability, we apply the substantial evidence standard of review. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.) Therefore, if there is substantial evidence to support the findings of the juvenile court, we uphold those findings. (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534.) We draw all reasonable inferences in support of the findings, consider the record most favorably to the juvenile court's order, and affirm the order if supported by substantial evidence even if other evidence supports a contrary conclusion. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.)

To overcome the preference for adoption and avoid termination of parental rights, it is the parent who has the burden of showing both regular visitation and contact and the benefit to the child in maintaining the parent-child relationship. (*In re Angel B., supra*, 97 Cal.App.4th at p. 466.) In other words, the parent must establish that his or her relationship with the child is one that promotes his well-being to such a degree that it outweighs the well-being the child would gain in a permanent home with new, adoptive parents. (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206-1207.) The department is not required to prove the exception does not exist. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1333.)

In deciding whether the exception applies, the juvenile court must balance the strength and quality of the natural parent-child relationship against the security and sense of belonging a new family would confer. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Father visited weekly, but he did not establish that Angelo and Daniel had significant, positive, emotional attachments to him or that he had a parental relationship with them. He points to the social worker's testimony at the selection and implementation hearing that he had weekly visitation, and the DCS report in which the social worker stated the "children appear to be bonding appropriately with the parents."

A single statement in a report that bonding appeared to be taking place does not establish the existence of a bond of such quality as to meet the statutory criteria for a beneficial relationship. The record shows Angelo played by himself at visits and did not show any affection toward father, although father attempted to engage him in play and asked for hugs and kisses. Although Angelo sometimes called father "poppy," father admitted Angelo had isolated himself at visits. Yet the record shows all the children were bonded to their caregivers, seeking out their attention, guidance and comfort, as well as showing that Angelo was demonstrative and affectionate with the caregivers. The record supports the court's finding that no beneficial parent-child relationship existed between Angelo and father.

As for his relationship with Daniel, the record supports no inference at all that a parent-child relationship existed, since Daniel had never been in father's care or custody and the contact between father and child was limited to father's holding the infant during

weekly visits. The record supports the court's finding that no beneficial parent-child relationship existed between Daniel and father.

Mother forfeited any argument that termination would be detrimental to the children under any of the exceptions. Mother presented no evidence at the hearing, and, during closing argument, mother's counsel argued only that mother was not in agreement with the recommendation to terminate parental rights because she would like to be able to regain custody of them in the future. Mother had the burden to show the statutory exception applied. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826-827.) By failing to raise the beneficial parental relationship exception at the section 366.26 hearing, and by presenting no evidence for the court to consider on this issue, mother forfeited the issue on appeal. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.)

Even if we were to reach the merits, the record does not show any bond between Angelo and his mother; instead, Angelo reacted to his mother with marked fear. With others, he was a very affectionate child who enjoyed being held and interacting with people. The lack of bonding was described five months prior to the selection and implementation hearing and mother failed to show any beneficial parental relationship developed by the time of the selection and implementation hearing. As for Daniel, the infant, he was never in mother's custody so her relationship to him was limited to holding him during visitation. She did not present any evidence at the selection and implementation hearing of any significant relationship.

Mother's relationship with the older children, Joseph and J., was better, but by September 2007, Joseph was bonded with his caretakers, wanted to live with them

forever, and did not want to move. The social worker acknowledged in February 2007 that J. had a bond with her mother, but mother presented no evidence it still existed eight months later. By the time of the hearing at which parental rights were terminated, all the children were bonded to their caregiver. No evidence was presented at the hearing to support an inference that mother had a beneficial parental relationship with Joseph and J. such as would outweigh the well-being the child would gain in a permanent home with new, adoptive parents. (*In re Autumn H.*, *supra*, 84 Cal.App.4th at pp. 1206-1207.)

Therefore, as to both parents, there is substantial evidence to support the termination of parental rights based on the lack of a beneficial parent-child relationship.

C. Because the Same Permanent Plan Was Made for All Four Children, Who Are in the Same Adoptive Placement, the Termination of Parental Rights Does Not Interfere with the Sibling Relationship.

Mother argues that termination of mother's parental rights to Angelo and Daniel should be reversed because there would be a significant interference with their relationship with their older siblings, Joseph and J., if the younger children have different permanent plans. No error establishing a ground for reversal of the orders terminating parental rights is presented here. All four children were together in the same adoptive placement, and the court adopted the same permanent plan of adoption for all four children by the same current caretakers.

Further, mother did not present any affirmative evidence at the selection and implementation hearing. The burden of proving the existence of an exception to the legislatively preferred plan of adoption is on the parent. (*In re Valerie A.* (2007) 152

Cal.App.4th 987, 997.) Mother failed to present evidence at the hearing and forfeited any argument that might have existed if the children had been the subject of different permanent plans. (*In re Lorenzo C.*, *supra*, 54 Cal.App.4th at pp. 1338-1339.)

3. Disposition

The judgment is affirmed.

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s/Gaut
J.

We concur:

s/McKinster
Acting P. J.

s/Miller
J.